Supreme Court, U.S.
FILED

94-1070 MAR 13 1995

OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

GULF SOUTH MEDICAL AND
SURGICAL INSTITUTE, ET ALS.

versus

AETNA LIFE INSURANCE COMPANY, ET ALS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI BY GULF SOUTH MEDICAL AND SURGICAL INSTITUE, ET ALS. APPELLANTS/RELATORS

Robert Nolan Clarke, Attorney for
GULF SOUTH MEDICAL AND
SURGICAL INSTITUTE, ET ALS.,
APPELLANTS/RELATORS
238½ Metairie Rd. Ste. B
Metairie, La. 70005
Telephone (507) 832-1107
LSBA #4161

61 pp

QUESTIONS PRESENTED FOR REVIEW

1. Have the Honorables, the U.S. Fifth Circuit Court of Appeals permitted the Trial Judge below it to go beyond well-established rules of procedural and substantive law in granting summary judgment upon Appellants action for enforcement of group medical benefits pursuant to ERISA, 29 U.S.C. 1132(a)(1)(B)?

2. May the identity of an anonymous supplier of information to an ERISA administrator or fiduciary be compelled to be revealed where his credentials, the extent and source of information is an issue in a benefits determination? Is a decision made without such revelation reliable per se under the circumstances presented in this matter?

LIST OF PARTIES

1. APPELLANTS/RELATORS:

   Gulf South Medical & Surgical Institute
   Burkes-Farber Clinics
   George Farber, M.D.

2. APPELLEES/RELATEES:

   Aetna Life Insurance Co.
   Medical Review Institute
   LaFarge Corporation

TABLE OF CONTENTS AND AUTHORITIES

	PAGE
TABLE OF CONTENTS AND AUTHORITIES	i-ii
STATEMENT OF JURISDICTION	1
STATEMENT OF STATUTES INVOLVED	1
STATEMENT OF THE CASE	1
ARGUMENT UPON QUESTIONS PRESENTED	2-6
CONCLUSION	6
CERTIFICATE OF SERVICE	
APPENDICES	

AUTHORITIES:

28 USC 1254(1)	1
29 USC 1132(a)(1)(B)	1
Fed. R. Civ. P. 56(c)	1
Fed. R. Civ. P. 59(a)(e)	1,4
Fed. R. Civ. P. 60(b)	1,3
Bachelor v. International Brotherhood of Electrical Workers Local 861, 877 F.2d 441 (5th Cir., 1989)	5
Massachussets Mutual Life Insurance Co. v. Russell, 473 U.S. 134, 105 S. Ct. 3085, 87 L. Ed. 2d 96 (1985)	6
McCarty v. Mayo, 827 F.2d 1310 (9th Cir., 1987)	4
Pierre v. Connecticut General Life Ins. Co., 932 F. 2d. 1552 (5th Cir., 1991) cert. den., 112 S.Ct. 453	5

PAGE

Sabbath v. U.S., 88 S.Ct. 1755, 391 U.S. 585, 20 L. Ed. 828 (1968) 4

Salley v. E.I. DuPont de Nemours & Co., 966 F.2d 1011 (5th Cir., 1992) 3

3 W. Fratcher, Scott on Trusts (4th Ed., 1988) 6

MAY IT PLEASE THE COURT:

I. BASIS OF JURISDICTION:

The supervisory jurisdiction of this Honorable Court over judgments of the United States Courts of Appeal is invoked pursuant to the provisions of 28 U.S.C. 1254(1).

Judgment was rendered and entered in the Honorable United States Court of Appeal For The Fifth Circuit on November 10, 1994; rehearing was denied by it on December 12, 1994 and entered that date.

II. STATUTES INVOLVED HEREIN:

1. 29 U.S.C. 1132(a) (1) (B)
2. Fed. R.Civ.P. 56(c)
3. Fed. R.Civ.P.59(a) (e)
4. Fed. R.Civ.P.60(b)

III. STATEMENT OF THE CASE:

Appellants, GULF SOUTH MEDICAL AND SURGICAL INSTITUTE, ET ALS, provided dermatological services unto Edwin Delaney, Jr., an employee of Appellee, LAFARGE CORPORATION, during 1988 to 1990, and accepted an assignment of insurance benefits under LAFARGE's self-insured benefit plan. Appellee, AETNA LIFE INSURANCE COMPANY, administered the plan and utilized the services of MEDICAL REVIEW INSTITUTE, Appellee, in review of the claims submitted by Appellants, GULF SOUTH, ET ALS. Approximately eighty (80%) per centum of Appellants' claims were denied by AETNA and Appellants, GULF SOUTH, ET ALS., brought suit under 29 U.S.C. 1132(a)(1)(B), the enforcement provisions of ERISA in Louisiana's Twenty-fourth Judicial District Court wherein Appellee, MEDICAL REVIEW INSTITUTE (MRI), obtained its dismissal due to a lack of personal jurisdiction. The remaining Appellees, AETNA and LAFARGE, removed the case to the U.S. District Court, Eastern District of Louisiana and were granted a summary judgment. An appeal as to all Appellees

was taken and the Honorables, the Fifth Circuit Court of Appeals affirmed, finding it unnecessary to reach the jurisdictional question as to MRI. Application for rehearing was denied and review by Writ of Certiorari to this Honorable Court has been sought.

IV. ARGUMENT:

The standard of judicial review, being that of abuse of discretion, has not been challenged. AETNA clearly had power under the LAFARGE plan to decide what were reasonable and customary charges, as well as the medical necessity for the procedures employed. The burden upon your Appellants or Relators is to establish material, substantial evidence of unreasonable actions or misconduct upon the said administrator's part in order to defeat its Motion For Summary Judgment.

While it was certainly permissible for the administrator, AETNA, to have delegated its authority to determine medical necessity to MRI, GULF SOUTH, ET ALS., had absolutely no control whatsoever over what AETNA sent to MRI for review or re-review. Appellants dealt at all times only with AETNA, initially supplying Health Claim Forms and supporting documentation, such as operative and pathology reports, and subsequently by complying with requests for supplemental facts. Moreover, GULF SOUTH, ET ALS., had no communications with MRI save indirectly, as aforesaid. This was confirmed in the deposition taken by Appellants of AETNA's cost containment person, Eileen Kingren. Appendix IV, Exhibit 1, pages 1-6.

MRI issued reports to AETNA, dated November 9, 1988 and March 7, 1989, a portion of the record evidence below, which have been deemed "...a reliable indication of the bases of Aetna's decisions," and upon which Ms. Kingren advised Edwin Delaney, Jr. his benefit claims were denied. Appendix IV, Exhibit 2; I, page 4; IV, Exhibit 1, page 7. Upon Application For Rehearing, Appellant through its counsel supplied the Fifth Circuit Court of Appeals with its exhibit compiled from the

volumes of record evidence, conclusively showing the abovesaid MRI reports to be fallacious in two respects. Either claims were outrightly omitted upon re-review by MRI, or the documentation, which AETNA submitted to the trial court in support of its Motion, did not find its way into MRI's hands. While the indication of the bases of AETNA's determinations may be reliable, the bases themselves are not. Further, although strenuously sought, the identity of the MRI "physician" was strenuously withheld by AETNA's counsel, also representing MRI herein, and MRI has been declared not subject to the jurisdiction of Louisiana courts. Appendix IV, Exhibit 3.

Following the declination of claims, the beneficiary, Edwin Delaney, Jr. made a request for review, resulting in an examination by Robert Rietschel, a dermatologist, convened by AETNA to determine if the skin grafts charged by GULF SOUTH, ET ALS. had been performed. After verification thereof, AETNA 's Eileen Kingren made no modification of the benefits determinations made with MRI's assist, all as abovesaid. Appendix IV, Exhibit 1, pages 9-14; IV; Exhibit 4. In addition, AETNA chose not to follow the suggestions of Dr. Rietschel and the MRI reviewer regarding further review by a board certified dermatopathologist. Appendix IV, Exhibits 4; 2; 1, pages 13, 15. This may be taken as an abuse of discretion standing alone. See Salley v. E.I. DuPont de Nemours & Co., 966 F. 2d 1011 (5th Cir., 1992) at 1015.

Counsel for Appellants, GULF SOUTH, ET ALS., shows that the decision of the Trial Court in these proceedings, granting summary judgment to Appellees, came on April Seventh, 1994 and that he was not received of the depositions taken in this matter until the Eighth day of April, 1994. Appellants immediately moved for reconsideration of the Court's under Rule 60(b), Fed. R.Civ.P., which was denied, the Court noting the lack of the depositions "...is wholly irrelevant; plaintiffs point to nothing in those depositions that support their position." Appendix II,

Exhibits 1, 2 at page 2. A subsequent Motion For New Trial by Rule 59(a)(e) was denied by the Court as Controlled by its ruling on the previous Motion. Appendix II, Exhibit 3. It is respectfully submitted that although the Court below did not specifically address an issue raised in the said Motion For New Trial, the Honorables, the U.S. Fifth Circuit Court of Appeals did, appertaining to the changing of procedure (CPT) or billing codes by AETNA's cost containment personnel. Appendix 1, page 3; IV, Exhibit 1, pages 16-17. AETNA, with MRI's assistance, changed the said codes upon the basis of reports or documentation supplied by Appellants, GULF SOUTH, ET ALS., which in pertinent part was not submitted by AETNA to MRI, or if such was, somehow became lost and reported by MRI to AETNA as undocumented. This fact was established and abstracted to the U.S. Fifth Circuit Court of Appeals as Exhibit A to Appellants' Application For Rehearing, to no avail. Appendix IV, Exhibit 3; III. (All of these said charges were involved in the grafting procedures for which AETNA consulted Dr. Rietschel, as aforesaid.)

Appellants show that despite due diligence, they were unable to present sufficient evidence prior to judgment herein. By the time GULF SOUTH, ET ALS.'s counsel was hand-received of the depositions taken by him, during the final day of a three (3) day trial of another case, summary judgment had already been rendered. From that point on, all of Appellants' pleas for relief were determined under a different standard, the burden having clearly shifted against them. See McCarty v. Mayo,827 F.2d 1310 (9th Cir., 1987). The record of these proceedings is voluminous and consists of numerous statements of medical facts requiring construction and collation by and between scientific opinion and lay testimony, the culmination of which said effort is the alteration of procedure (CPT) codes briefed to and addressed by the Honorables, the U.S. Fifth Circuit Court of Appeals. Its decision upon the issue is reviewable by this Honorable Court. Sabbath v. U.S., 88 S.Ct. 1755, 391 U.S. 585, 20

L.Ed. 828 (1968).

The case of Pierre v. Connecticut General Life Ins. Co., 932 F.2d 1552 (5th Cir., 1991) cert. den., 112 S.Ct. 453 (1991) was cited by both Courts below in regard to reliability of the "material on which the determination was made," or the bases therefor. See, Appendix II, Exhibit 1, page 6; I, page 4. Accordingly, the administrator, AETNA is permitted to utilize hearsay, the MRI reports, in the formulation of its decisions, which, in most if not all instances, were to adopt the determination of MRI as its own. GULF SOUTH, ET ALS. have shown glaring deficiencies in the routing of information between AETNA and MRI, Appellees, which lead to denials of benefits approximating Fifty Thousand and No/100 ($50,000.00) Dollars by the date of MRI's re-review of March 7, 1989, denying claims it had approved in its review of November 9, 1988 by omission and those subsequent to the said review as undocumented. As suggested previously, any attempts to inquire of the anonymous reviewer regarding his informational bases were resisted by Appellees' refusal to disclose his identity.

In Bachelor v. International Brotherhood of Electrical Workers Local 861, 877 F.2d 441 (5th Cir., 1989) at 444, the Court below set out three considerations to guide the inquiry of an abuse of discretion, to-wit:

1. the internal consistency of the plan under the interpretation given by the trustees;
2. any relevant regulations formulated by the appropriate administrative agency; and
3. factual background of the determination and inferences of lack of good faith.

A focus similar to that of Bachelor, Id, is found in trust law:

1. the extent of discretion intended to be conferred upon the trustee of the trust;
2. the existence or nonexistence, the definiteness or indefiniteness,

of an external standard by which the reasonableness of the trustee's conduct can be judged;

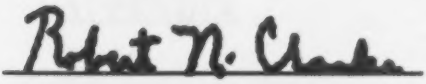
3. the circumstances surrounding the exercise of the power;
4. the motives of the trustee in exercising or refraining from exercising the power;
5. the existence or nonexistence of an interest in the trustee conflicting with that of the beneficiaries.

3 W. Fratcher, Scott on Trusts, Section 187 (4th Ed., 1988). Mr. Justice Brennan, in his concurring opinion to Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed. 2d 96 (1985), observed that Congress intended trust law principles to become the enforcement scheme of ERISA and that Courts should provide the remedies needed to protect the rights of the beneficiaries. Id, at 156-57, 105 S.Ct. at 3097-98.

V. CONCLUSION:

Appellants, GULF SOUTH, ET ALS., have presented for this Honorable Court's review their argument, factually based upon the record evidence, establishing an abuse of discretion and a lack of good faith by design, if not intent, on the part of Appellees, AETNA and MRI, employed by LAFARGE to administer and preserve the assets of the group medical benefits plan to which Edwin Delaney, Jr. belonged. It is respectfully submitted that the open and flagrant violation of the rights/ interests of the beneficiary is now patently before this Honorable Court for determination in accordance with the law and principles recited. To sanction such conduct or practices by ERISA fiduciaries under the circumstances shown would be a travesty.

RESPECTFULLY SUBMITTED:



Robert N. Clarke, Attorney for
GULF SOUTH MEDICAL & SURGICAL
INSTITUTE, ET ALS., Appellants/Relators
238 1/2 Metairie Rd. Ste. B
Metairie, La. 70005
Tel.: 504-832-1107 LSBA #4161